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BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
NO. 53221-s40Q BY JOHN E. AND)	
BETTY J. CARNEY)	

* * * * *

The time period for filing exceptions to the Hearing Examiner's Proposal for Decision has expired. The Applicant filed timely exceptions. For the reasons stated below, and after having given the objection full consideration, the Department of Natural Resources and Conservation (hereafter, "Department"), with the modifications noted below, hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the Proposal for Decision and incorporates them herein by reference.

RESPONSE TO COMMENTS AND EXCEPTIONS

A. Proposed Findings of Fact

3.) The Applicant had ample opportunity at the hearing to discuss the proposed design of the proposed project. The Objector's attorney and the Hearing Examiner both questioned the Applicant on this point. The Applicant stated that he did not intend to design the dam according to the SCS preliminary design which was part of the Department's Exhibit D-1. The Applicant made no attempt to elaborate as to how his proposed design would differ from the SCS Design. The burden of proof is on the Applicant to submit this information.

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4.) Again, the Applicant is relying upon the SCS design which he stated he did not intend to follow. When questioned by the Hearing Examiner regarding possible safety features of the dam such as proper footing, the Applicant stated that this was a small dam and such design features were not considered necessary.

5.) The Applicant did testify that the proposed reservoir could be used for boating and swimming. Boating was mentioned as incidental to the use of the reservoir for fishing which was an incidental use of the water on the Application. The Applicant is referred to Proposed Conclusion of Law No. 3 on page 12 of the Proposal for Decision for a further discussion of this matter.

Any use of the reservoir by wildlife would fall under the incidental fish and wildlife use specified in the Application.

6.) The Applicant stated at the hearing that one of the purposes of the excavation behind the dam was to provide a deep enough area in the reservoir for the over-wintering of fish. The Applicant's discussion of removing muck and sludge in relation to an SCS-designed core trench was not mentioned at the hearing and is thus not a part of the record.

7.) The Applicant was directly questioned by the Hearing Examiner concerning the necessity of the proposed volume of the reservoir to satisfy the Applicant's proposed beneficial use. The Applicant's response was that 270 acre-feet would be impounded by a structure the height of the proposed dam. Again, the burden of proof is on the Applicant to justify his request.

9.) The Hearing Examiner's calculations regarding evaporation were made as follows:

35 inches = 2.92 feet

Surface area of reservoir = 43 acres

Evaporative loss in acre-feet = $2.92 \times 43 \text{ acres} = 125.6$

acre-feet (less the amount accounted for by the decreasing surface area of the reservoir as evaporation takes place.)

The Proposed Finding of Fact No. 9 incorrectly stated the surface area of the reservoir as 43 acre-feet instead of 43 acres.

12.) The error in the Objector's land description which was corrected at the hearing was omitted in the Proposed Findings of Fact. This omission has no substantive bearing on the decision in this matter. The Hearing Examiner made no finding regarding the Objectors's claimed flow rate and volume for three (3) reasons:

- a) There was insufficient evidence presented beyond the Objector's Statement of Claim of Existing Water Right to make such findings;
- b) The Objector's Claim has not yet been adjudicated by the Montana Water Courts;
- c) Since such a finding was not necessary to reach a Proposal for Decision in this matter, no finding was made. By not making a finding, neither the Applicant nor Objector will be prejudiced should the Applicant decide to re-apply for this project.

13.) The testimony of the Objector and the Department's witness was that 160 to 180 acres are currently irrigated by the Objector.

14.) Statement of Claim No. 40368 specifies a period of use from March 1 to July 1.

B. Proposed Conclusions of Law

1.) No reply necessary.

2.) No reply necessary.

3. and 4.) The type of recreational use contemplated by the Applicant and the limit of the appropriation cannot be discussed separately. An appropriation for swimming would require less water than one for sailboating or motorboating. Furthermore, the Applicants must clearly define the extent of such uses; i.e. is the proposed facility to serve only the Applicants, or is it going to serve 500 people? Such information is necessary to determine the extent of the right. Such information was not presented at the hearing.

5.) The Hearing Examiner did not mean to imply that the Applicant claimed storage of water to be beneficial. This Conclusion of Law is made to help clarify the necessity for determining the actual beneficial use contemplated and thus the amount of water needed to satisfy that use. Any amount of water stored beyond the minimum necessary would not be put to beneficial use as required by law.

6.) The Objector's attorney questioned the Applicant at length regarding the design of the project. The Applicant stated that he did not propose to construct the project according to SCS specifications. When questioned as to the exact design of the project the Applicant chose not to elaborate beyond the details

contained in Exhibit A-5. The Applicant was afforded more than ample opportunities to present information on the design of the project.

7.) The Applicant's burden of proof carries to all of the criteria under § 85-2-311, MCA, (temporary). A failure to meet any one (1) of these criteria requires denial of the Application by the Department. The Hearing Examiner deliberately omitted making findings regarding unappropriated water in the source and adverse effects on the Objector. This omission was made in order not to prejudice either parties' efforts should the Applicants choose to submit a new application for this project.

The Proposal for Decision in this matter as entered by the Hearing Examiner on June 1, 1984, is hereby adopted as final with the following correction:

Proposed Finding of Fact No. 9:

"...Therefore, with a surface area of approximately 43 acre-feet,..." is amended to read:

"...Therefore, with a surface area of approximately 43 acres, ..."

Based upon the amended Findings of Fact and Conclusions of Law, the Department makes the following Order:

FINAL ORDER

1. Application for Beneficial Water Use Permit No. 53221-s40Q by John E. and Betty J. Carney is hereby denied and dismissed in its entirety.

DONE this 7th day of August, 1984.

Gary Fritz
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605

David L. Pengelly
David Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 5004, Missoula, MT 59806
(406) 721 4284

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on August 8, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by John and Betty Carney, Application No. 53221-s400, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. John E. & Betty J. Carney, c/o Steve Carney, Box 2730, Scobey, MT 59263
2. Ronald Tande & Tande Ranch, Rural Route Box 188, Scobey, MT 59263
3. Robert Hurley, Attorney at Law, P.O. Box 1170, Glasgow, MT 59230
4. E.L. Meredith, U.S. Dept. of the Interior, Office of the Solicitor, P.O. Box 1538, Billings, MT 59103
5. Reid Peyton Chambers, Sonosky, Chambers, Sachse, and Guido, 1050 31st Street, N.W., Washington, DC 20007
6. Vivian Lighthizer, Water Rights Field Office, Glasgow, MT (inter-departmental mail)
7. David Pengelly, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 8th day of August, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

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IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Kohn

Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-1-85

CASE # 53221

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT) PROPOSAL FOR DECISION
NO. 53221-s40Q BY JOHN E. AND)
BETTY J. CARNEY)

* * * * *

Pursuant to the Montana Water Use Act and the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Glasgow, Montana, on April 17, 1984.

STATEMENT OF THE CASE

On July 21, 1983, an Application for Beneficial Water Use Permit No. 53221-s40Q was filed with the Department of Natural Resources and Conservation (hereafter, "Department") by John E. and Betty J. Carney. The Applicants generally seek to impound up to 270 acre-feet per annum of the waters of an unnamed tributary of Coal Creek by means of a dam in the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 9, Township 37 North, Range 45 East, Daniels County, Montana. The Applicants seek to divert water from January 1 to December 31 for recreation purposes with incidental fish and wildlife use.

Pertinent portions of this Application were duly published for two successive weeks in the Daniels County Leader, a newspaper of general circulation printed and published in Scobey, Montana.

A timely objection to the above-referenced Application was received from Ronald Tande and Tande Ranch, Inc..

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The Applicants appeared at the hearing through Mr. John E. Carney and Mr. Steve Carney. Mr. Greg L. Pauley was called as a witness on behalf of the Applicants.

Objector Mr. Ronald Tande was represented at the hearing by legal counsel, Mr. Robert Hurley, Glasgow, Montana. Objector Tande Ranch, Inc., was represented at the hearing by legal counsel, Mr. John Scully, Bozeman, Montana. Appearing as a witness on behalf of Tande Ranch, Inc. was Mr. C. William Tande, an officer of Tande Ranch, Inc.. For purposes of this Order, Mr. Ronald Tande and Tande Ranch, Inc. will be referred to collectively as "Objector".

The Department was represented at the hearing by Mr. Don Cox, New Appropriations Specialist of the Glasgow Area Field Office of the Department's Water Rights Bureau.

EXHIBITS

The Applicants offered the following exhibits into the record, to wit:

- A1: A USGS map of the general area of the Application including the approximate drainage area boundaries of Coal Creek and said unnamed tributary of Coal Creek.
- A2: A map of Daniels County with the approximate drainage area of Coal Creek outlined.
- A3: Maps showing the property ownerships in the area of the Applicants' proposed project and the Objector's water spreading system from Coal Creek.

- A4: A map showing the approximate distribution of various water projects within the Poplar River Basin in United States and Canada with the approximate drainage area of Coal Creek outlined.
- A5: A scale drawing of Applicants' proposed dam.
- A6: The title page and introduction of the Poplar River Basin Report.
- A7: A map of the Poplar River drainage basin with the Coal Creek drainage basin outlined.
- A8: Information on stream flow and water use from the Poplar River Basin Report including the following pages: 14, 28, 18, 21, Appendix A46, Appendix A22, and Appendix C10.
- A9: Annual natural flows from 1931 to 1982 of the Middle Fork of the Poplar River, Coal Creek, and unnamed tributary of Coal Creek. (Applicants' Exhibits 9-12 are documents prepared by the Applicants using information derived from the Poplar River Basin Report.)
- A10: Natural flows in acre-feet from 1961 to 1982 for the months of March, April, May and June for the Middle Fork of the Poplar River, Coal Creek, and said unnamed tributary of Coal Creek.
- A11: Monthly flows in acre-feet for the Middle Fork of the Poplar River for the months of February through July, for the years of 1961 through 1982.

- A12.: Monthly flows in acre-feet of the Middle Fork of the Poplar River, for the months of March through June of the years 1961 through 1982.
- A13: Estimated natural flow of Coal Creek near Four Buttes, Montana; (Exhibit is reproduction of Table B22 from Poplar River Basin Report).
- A14: Natural flows and flows adjusted for use of the Middle Fork of the Poplar River and Coal Creek from 1961 to 1982.
- A15: A series of photographs taken on March 22 and 23, 1984, by Steve Carney and Stan Richardson showing the Objector's water spreading system and the Applicants' proposed dam site on said unnamed tributary of Coal Creek.

Applicants' Exhibits A1, A2, A3, and A15 were introduced into the record with no objections. Objections to the admission into evidence of Applicants' Exhibits A4, A6, and A8 through A14 were made by both Mr. Scully and Mr. Hurley. Mr. Scully's objections to the introduction of the Exhibits were based on the following: a) the Poplar River Basin Commission Report is not complete and available for review by the Objector, b) the portions of the Report regarding existing water uses are not valid for determining existing water uses in Montana, c) the parties who prepared the Report were not made available for cross-examination by the Objector.

Mr. Hurley's objections were based on the following grounds; a) information presented was heresay, b) parties preparing the Report were not available for cross-examination, and c) some of the information in the Report was shown to be incorrect, therefore the Report should not be admitted into evidence.

Exhibit A4 is accepted into the record for the limited purpose of showing the relative location of the Coal Creek Basin within the larger Poplar River drainage basin. No other information available on this exhibit, such as suggested existing water use projects, is admitted into the record.

Applicants' Exhibit A6 is accepted into the record for the limited purpose of identifying and introducing some of the Applicants' later exhibits. This acceptance is based on the informal nature of the hearing and the fact that the Poplar River Basin Report is a government prepared document within the Department's field of expertise. Therefore, the Report is subject to administrative notice by this Hearing Examiner, even if it had not been introduced as an exhibit at this hearing. MCA § 2-4-612(6). From Applicants' Exhibit A8, the description of natural flow (page 14) and the table of annual natural flows in acre-feet at selected locations in the Poplar Basin (page 28) are accepted into the record for the reasons stated above regarding Exhibit A6. The remainder of Exhibit A8 is not accepted into the record since these portions of the Exhibit refer only to existing water uses in the basin. While this report may reasonably document existing water uses, it does not even purport to reflect any water rights associated with those

uses. The relevant issue is whether the proposed use will adversely affect the water rights of a prior appropriator. MCA § 85-2-311(1)(b). The relationship between the nature of the existing uses and the extent of the valid appropriative rights associated therewith was not addressed. Therefore, much of the information is not relevant to the Application at hand.

Applicants' Exhibits A9 through A13 are accepted into the record. The information in these exhibits derives from either the Poplar River Basin Report or from the field report prepared in this matter by Mr. Don Cox who was available for cross-examination at the hearing. Applicants' Exhibit A14 is not accepted into the record. This exhibit is repititious of previous exhibits regarding flows in the Middle Fork of the Poplar River and Coal Creek, and it purports to show flows remaining after use of water from these sources with no valid documentation to support the calculations used to derive the extent of these existing uses of water. Mr. Scully also objected to the admittance of Applicants' Exhibit A7 on the grounds that the information in the Exhibit was repetitive of that provided in Applicants' Exhibit A4. The objection by Mr. Scully is sustained and Exhibit A7 is not admitted into the record due to its repetitious nature.

The Objector introduced the following exhibit into the record, to wit:

01: Statement of Claim of Existing Water Right No. 40368.

Objector's Exhibit 01 was introduced into the record with no objections.

The Department introduced the following exhibits into the record, to wit:

- D1: Field Investigation report and attached materials regarding the Applicants' proposed project, attachments including: a) map showing location of proposed project, b) article entitled "Ponds for Water Supply and Recreation", c) worksheet documenting telephone communication between Mr. Don Cox and various parties, d) map of proposed reservoir showing general surface area of the reservoir at 270 acre-feet of storage, e) United States, Soil Conservation Service (hereafter, "SCS") worksheets of possible designs for proposed dam, f) SCS hydrograph computations for proposed project.
- D2: Field Investigation Report regarding Objector Tande Ranch, Inc. This Exhibit includes the following: a) field investigation report, b) map of location of Tande Ranch water spreading system, c) 1982 water discharge records of the Poplar River at the International Boundary, d) Statement of Claim No. 40368, e) photographs of Objector's water spreading system.

Mr. Scully objected to the introduction of the Department's Exhibits. His objection was based on the lack of a stand by the Department either for or against the project and the fact that both parties had rested their respective cases. The Department's Exhibits are accepted into the record, for the following reasons:

a) the Department's role at the hearing was spelled out in the

notice of hearing materials, b) the exhibit materials were sent to the parties prior to the hearing, and c) the person who prepared the exhibits was available for cross-examination. Preparation and admission of Departmental data is explicitly provided for in the contested case provisions of the Administrative Procedures Act. MCA § 2-4-614(g).

MOTIONS AND OBJECTIONS

During the course of the hearing Mr. Scully raised an objection to the cross-examination of the Applicant by the Hearing Examiner regarding the nature of the Applicant's beneficial use and repeated questioning regarding the size of the reservoir. Mr. Scully also objected to the introduction of Mr. Don Cox as a witness on the grounds that the Applicant and Objectors had rested their cases and that the Department should not participate further at that point.

The testimony of Mr. Don Cox will be accepted because both the hearing information presented to the parties prior to the hearing and the procedural outline of the hearing set forth by the Hearing Examiner specified that the Department would be available for testimony and cross-examination through Mr. Don Cox after the Applicants and Objectors put on their cases. Furthermore, it is the Hearing Examiner's prerogative to question any of the parties involved at the hearing if the Examiner feels that such questioning is necessary to get a clearer and more

complete hearing record upon which to base a decision. MCA § 2-4-611. Therefore, any testimony presented in response to questions by the Hearing Examiner is accepted into the record.

PROPOSED FINDINGS OF FACT

The Proposed Findings of Fact listed below are made solely for purposes of reaching a decision in this matter and have no bearing on matters outside the scope of this Application and hearing.

1. The source of water in the instant Application is an unnamed tributary of Coal Creek which in itself is a tributary to the Middle Fork of the Poplar River. The Middle Fork of the Poplar River is also known as Lost Child Creek.
2. The Applicants propose to impound 270 acre-feet of water by means of a dirt-fill across the drainage of said unnamed tributary of Coal Creek. The surface area of the proposed reservoir would be 42-43 acres.
3. Although designs for the proposed project appear to have been drafted by the SCS, the Applicant does not necessarily intend to build the proposed project according to any of these design plans.
4. Other than the installation of some type of spillway, the Applicant presented no plans to show that the project would be constructed in a safe and secure manner.

5. The proposed use of the reservoir is for recreational purposes. The only specific use of the reservoir identified is its potential as a fishing hole. Such use for fish and wildlife purposes was identified in the Application as an incidental use of the reservoir.

6. The Applicant proposes to excavate behind the face of the dam approximately 10 feet deep and ten to twelve feet upstream from the face of the dam in order to provide additional depth at that point in the reservoir.

7. No information was provided why a 270 acre-feet reservoir is necessary to satisfy the Applicants' proposed beneficial use for recreation purposes.

8. The design plan submitted by the Applicant makes it apparent that the proposed reservoir would impound all waters flowing down said unnamed tributary each year until the reservoir is filled and at that time any additional waters flowing into the reservoir would be passed over the spillway of the reservoir.

9. The Applicant suggested a yearly loss of 25 to 30 acre-feet of water from the reservoir due to evaporation. The Hearing Examiner takes administrative notice of the following report for purposes of determining evaporation from the proposed reservoir: NOAA Technical Report NWS 33, Evaporation Atlas for Contiguous 48 United States, US Dept. of Commerce, June, 1982. The freewater surface evaporation from shallow lakes in the vicinity of the Applicants' proposed project is approximately 35 inches per year. Therefore, with a surface area of approximately 43 acre-feet, the yearly evaporation from the proposed reservoir

would be far in excess of the 25 acre-feet per annum suggested by the Applicant. The Hearing Examiner cannot derive a specific evaporative loss because the changing surface area of the reservoir as evaporation takes place is not known by the Hearing Examiner. An estimate of the yearly evaporation would be in excess of 100 acre-feet per annum, however.

10. The drainage area of said unnamed tributary comprises 9% of the total drainage area of the Coal Creek drainage within the United States and approximately 5% of the total drainage area of the Coal Creek basin.

11. Most runoff in the Coal Creek drainage basin occurs from March through July.

12. The Objector has a valid existing irrigation right from Coal Creek (Statement of Claim No. 40368).

13. The Objector currently is irrigating approximately 160 to 180 acres of pasture and hay.

14. The Objector diverts water for irrigation use during a time period when it is also sought by the Applicant, i.e. from March 1 to July 1.

PROPOSED CONCLUSIONS OF LAW

1. The Department of Natural Resources and Conservation has jurisdiction to approve, modify, or deny the proposed Application for Beneficial Water Use Permit requested by John E. and Betty J. Carney. (MCA § 85-2-312(1)).

2. MCA § 85-2-311 directs the Department to issue a permit if the Applicant proves by substantial credible evidence that the following criteria are met:

- (a) there are unappropriated waters in the source of supply;
- (i) at times when the water can be put to the use proposed by the applicant;
- (ii) in the amount the applicant seeks to appropriate; and
- (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;
- (b) the water rights of a prior appropriator will not be adversely affected;
- (c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;
- (d) the proposed use of water is a beneficial use;
- (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

3. MCA § 85-2-102(2) defines recreation use as a beneficial use. However, the mere assertion by an applicant that a proposed use is for recreation does not in and of itself meet the statutory burden imposed on the Applicants to show that the proposed use is a beneficial use. Rather, the Applicant must demonstrate his specific planned use of the water. The Applicant failed to provide a specific plan of the proposed recreational use beyond the assertion that "there may be fish stocked in the reservoir" or "there may be some swimming or fishing in the reservoir by the Applicants or the public". Such statements are not sufficient showing by the Applicants to meet their burden of substantial credible evidence that the proposed use is a beneficial use.

4. Furthermore, in determining the limits of the beneficial use of an appropriation right, there must be a determination of the "duty" of the water to be appropriated. Warden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939). In the instant case, there was no showing by the Applicant why 270 acre-feet of water are required as opposed to some either lesser or greater amount of water.

This again is evidence that there is not a clear, fixed plan by the Applicants for the beneficial use of this resource. If the Applicants could satisfy their desire for a recreational water use permit with less water than requested, then the Department should so condition the permit. Recreational use of water as proposed by the Applicants is unlike an irrigation use where an upper limit can reasonably be determined. For a recreation reservoir, it can be assumed that the more water that can be impounded, the better. Since the beneficial use is the basis and limit of an appropriation right, that amount which can be beneficially used is the limit of the right. Toohy v. Campbell, 24 Mont. 13(1900), Allen v. Petrick, 69 Mont. 373, (1924). Any amount of water diverted beyond that necessary for the beneficial use does not constitute a valid water right. Conrow v. Huffine, 48 Mont. 437(1914), Sayre v. Johnson, 33 Mont. 15, (1905). However, the record is devoid of the necessary evidence as to the actual beneficial use to which Applicants intend to put all of the water for which they have applied.

5. The Applicants opened the hearing by citing MCA § 85-2-101(3) regarding storing waters for beneficial use. The storage of water in and of itself is not a beneficial use, rather it is incidental to a beneficial use. Federal Land Bank v. Morris, 112 Mont. 445, 116 P.2d 1007 (1941); In the Matter of the Application for Beneficial Water Use Permit No. 12016-s41G, by Don L. Brown, Department's Final Order, April 24, 1984, PP. 14-16. Like a ditch or a canal, it is a means by which recreation or irrigation use is made possible.

6. A reservoir of the size contemplated by the Applicant must be constructed in a safe and secure manner (MCA § 85-15-102(1)).

The failure of the Applicant either to submit a proposed design structure for the project or to agree to build the project according to a design structure by a competent engineering agency such as the SCS, is evidence that the proposed means of diversion or impoundment of the appropriation works have not been shown by substantial credible evidence to be adequate.

7. Since an Applicant is required to show by substantial credible evidence that all of the criteria necessary for the issuance of the permit have been met, and since the Applicants in this matter have failed to demonstrate that the proposed use of water is in fact a beneficial use, or that the proposed means of diversion and operation of the appropriation works are adequate, no finding is necessary as to whether there are unappropriated waters in the source of supply; whether the water rights of a prior appropriator would be adversely affected; whether the proposed use will interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner hereby makes the following Order:

PROPOSED ORDER

1. Application for Beneficial Water Use Permit No. 53221-s40Q by John E. and Betty J. Carney is hereby denied and dismissed in its entirety.

DONE this 1st day of June, 1984.

David L. Pengelly
David L. Pengelly, Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 5004,
Missoula, MT 59806
(406) 721 - 4284

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before June 25, 1984.

AFFIDAVIT OF SERVICE
MAILING

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 5, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by John and Betty Carney, Application No. 53221-s40Q, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. John E. and Betty J. Carney, 2021 5th, Helena, MT 59601
2. Steve Carney, Box 2730, Scobey, MT 59263
3. Ronald Tande & Tande Randh, Inc., Rural Route Box 188, Scobey, MT 59263
4. Robert Hurley, Attorney at Law, P.O. Box 1170, Glasgow, MT 59230
5. John Scully, The Baltimore, 222 East Main, Suite 301, Bozeman, MT 59715
6. E.L. Meredith, U.S. Dept. of the Interior, Office of the Solicitor, P.O. Box 1538, Billings, MT 59103
7. Reid Peyton Chambers, Sonosky, Chambers, Sachse, and Guido, 1050 31st Street, N.W., Washington, DC 2007
8. Vivian Lighthizer, Water Rights Field Office, Glasgow, MT (inter-departmental mail)
9. David Pengelly, Hearing Examiner (hand deliver)


DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 5th day of June, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Notary Public for the State of Montana
Residing at Helena, Montana
My Commission expires 1-21-98

CASE # 53221